

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

Janet Makin, et al. v. State of Hawaii, et al. **Civil No. 98-00997 DAE**

- TO: 1. All mentally retarded/developmentally disabled persons living at home who have been placed on a waitlist for Medicaid waiver services from Hawaii's Home and Community-Based Services (HCBS-MR) program; and
2. All mentally retarded/developmentally disabled persons who are not living at home who have been placed on a waitlist for Medicaid waiver services from Hawaii's Home and Community-Based Services (HCBS-MR) program. This includes MR/DD persons who reside in foster homes, domiciliary homes, care homes, nursing facilities, unspecified institutions, or in other undefined or unknown circumstances.

READ THIS NOTICE CAREFULLY. IT MAY AFFECT YOUR LEGAL RIGHTS.

The STATE OF HAWAII, the Governor, and Directors and certain officers of the Department of Human Services and the Department of Health ("Defendants") have agreed to settle a class action lawsuit (the "Lawsuit") pending in the United States District Court for the District of Hawaii.

The Lawsuit was brought by JANET MAKIN, ROBERT MULLAN, BRANDON DELACRUZ, BARBARA THAI, JEFFREY STUBBS, on behalf of themselves and all other similarly situated persons, and the HAWAII DISABILITY RIGHTS CENTER, on behalf of a class and subclass of Plaintiffs (collectively, the "Class Plaintiffs"). The Class Plaintiffs alleged that Hawaii's administration of its Home and Community-Based Waiver Services ("HCBS-MR") program and waitlist policies violated the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.* ("Section 504" or "Rehab Act"); the Federal Medicaid Act; and their Constitutional rights to equal protection and substantive due process.

1. THE DEFINITION OF THE SETTLEMENT CLASS MEMBERS

The Settlement Class Members are defined as follows:

Class Members. The certified class consists of persons living at home who are on a waitlist for services from the State of Hawaii Medicaid program for Home and Community-Based Waiver Services for the Developmentally Disabled or Mentally Retarded and seek but are denied such services solely because of a lack of state funding for those services.

Subclass Members. The certified subclass consists of people who are on the wait list for the state Medicaid program of HCBS-DD/MR (program) and who live in foster, domiciliary or care homes, nursing facilities, unspecified institutions, or in other undefined or unknown circumstances. The sub-class members live in non-institutional or home-like settings.

If you are included in one of these classes, you are a Settlement Class Member. The Proposed Settlement may affect your rights and obligations and you may be entitled to the benefits and be bound by the Proposed Settlement.

2. SUMMARY OF THE PROPOSED SETTLEMENT

A. Provision of Services

Under the Section 4 of the Settlement Agreement entitled "Provision of Services", the Parties have agreed that more people shall receive HCBS and that the services will be governed by certain conditions, as quoted here:

4.1. The State of Hawaii will provide appropriate and needed home and community services to at least 700 qualified developmentally disabled or mentally retarded people from the wait list for Medicaid funded home and community based services by June 30, 2003, subject to legislative appropriations and approval by the federal Health Care Financing Administration (HCFA). The State will exercise its best efforts to obtain those appropriations and that approval. The source of the funding for services is a matter of state choice.

4.2. On the eligibility of people for the services covered in paragraph 4.1, the State of Hawaii will not seek to change the statutory definition of mental retardation or developmental disabilities in chapter 333F, Hawaii Revised Statutes (HRS), and the State of Hawaii will not impose an age or intelligence quotient limit on the receipt of home and community based services, subject to the following reservations. The State of Hawaii reserves the right to seek a modification of the Medicaid Home and Community Based Services (HCBS) for the Developmentally Disabled or Mentally Retarded (DD/MR) waiver (waiver) by HCFA. The State of Hawaii further reserves the right to implement eligibility changes consistent with the State Medicaid plan, the comprehensive plan to be developed with public participation under paragraph 4.7, and the requirements of the Medicaid statute and regulations.

4.3. The State of Hawaii will admit qualified people to the services covered in paragraph 4.1 using person centered planning and community based services consistent with HRS chapter 333F.

4.4. The priorities of admission of people to services covered in paragraph 4.1 will follow the present admission policy of November, 1998. (In summary, that policy, for those who have no alternatives, admits first those in the emergency category, second those whose care givers will soon be exhausted or unavailable, and third other people on a first-in first-out basis. In application, the full text of the policy applies.) The State of Hawaii reserves the right to change the admission policy consistently with the

state Medicaid plan, the comprehensive plan to be developed with public participation under paragraph 4.7, and the requirements of the Medicaid statute and regulations.

4.5. The State of Hawaii will provide Medicaid funding for level of care evaluations for admissions to services for those wait list people who are Medicaid eligible.

4.6. The State of Hawaii will send out a letter to each person on the wait list informing them of their due process rights.

4.7. By December 31, 2001, the State of Hawaii will develop a comprehensive plan to move the wait list at a reasonable pace after June 30, 2003. The State of Hawaii will obtain public participation in the development of the plan.

4.8. This Agreement does not encompass or provide for the payment of any amounts directly to any of the specific, individual members or groups of the certified Plaintiff Class or Subclass, or to the Class and Subclass as a group or groups.

B. Attorneys' Fees and Costs

Under the Section 5 of the Settlement Agreement entitled "Attorneys Fees and Costs", the Parties have agreed to resolve the issue of Plaintiffs' attorneys' fees and costs by settlement, either by separate agreement or as a supplement to the Settlement Agreement. For settlement purposes, the Plaintiffs shall not claim or recover any fees or costs incurred after April 6, 2000, for this lawsuit. The Plaintiffs will support all claims for attorney fees and costs by detailed accounting equivalent to that required to support a motion in federal court for attorney fees and costs.

If the Parties do not settle the issue of fees and costs, Plaintiffs reserve the right to seek their attorney fees and costs by motion in federal court before the filing of the dismissal of the Makin lawsuit without prejudice.

If Plaintiffs renew their complaint, they shall not seek attorneys' fees or costs for all items covered by claims for attorney fees and costs that are previously resolved by settlement or motion.

C. Dismissal of Lawsuit and Statute of Limitations

Under the Section 7 of the Settlement Agreement entitled "Miscellaneous", the Parties have agreed to the following dismissal process, quoted here:

7.1. Dismissal. Plaintiff and State Defendants shall execute and file appropriate pleadings dismissing without prejudice Plaintiffs' Makin lawsuit, U.S.D.C. Civil No. 98-00997 DAE, asserting the Covered Claims after Court approval of this [Settlement] Agreement. If the State of Hawaii serves at least 700 additional people with home and community based services as provided in paragraph 4.1, certifies that fact to the Plaintiffs, and Plaintiffs do not renew their complaint before October 1, 2003, then the dismissal shall be with prejudice.

7.2. Tolling. If Plaintiffs renew their complaint, the time between the filing of the dismissal without prejudice and June 30, 2003, inclusive, shall not be included in computing the time limited by any statutes of limitations under the causes of action that may arise out of the covered claims, if any statute of limitations periods are applicable.

3. YOUR OPTIONS AS A SETTLEMENT CLASS MEMBER

If you are a Settlement Class member, your options are:

A. You May Object to the Proposed Settlement

If you believe that the Proposed Settlement should not be given final approval by the Court, you may object to it personally or through an attorney. Any objection to the Proposed Settlement must be submitted in writing and mailed to and received by the attorneys representing the Class Plaintiffs, SHAWN A. LUIZ, ESQ. or MATTHEW C. BASSETT, ESQ., Hawaii Disability Rights Center, 1580 Makaloa Street, Suite 1060, Honolulu, Hawaii 96814, telephone (808) 949-2922, ext. 207; fax (808) 949-2928, on or before **July 3, 2000**.

You may also appear at the hearing to be held on **August 14, 2000 at 9:00 a.m.**, at the United States District Court for the District of Hawaii, 300 Ala Moana Boulevard, Honolulu, Hawaii 96850.

If you wish to have an attorney represent you in presenting your objection to the Proposed Settlement, you must serve your objection in the manner and by the time identified above and your attorney must also file a timely Notice of Appearance with the United States District Court for the District of Hawaii.

B. You May Opt Out of the Proposed Settlement

If you "opt out" or exclude yourself from the Lawsuit and Proposed Settlement, (i) you will not be bound by the Proposed Settlement; (ii) you will not be entitled to any of the benefits of the Proposed Settlement; and (iii) you may be able to bring a separate lawsuit against the Defendants.

If you wish to exclude yourself from the Lawsuit and Proposed Settlement, you must submit a written Opt-Out Statement to the attorneys for the Class Plaintiffs, SHAWN A. LUIZ, ESQ. or MATTHEW C. BASSETT, ESQ., Hawaii Disability Rights Center, 1580 Makaloa Street, Suite 1060, Honolulu, Hawaii 96814, telephone (808) 949-2922, ext. 207; fax (808) 949-2928, on or before **July 3, 2000**. Your Opt-Out Statement must be written, signed and dated by you, include your name, address, Social Security Number and day and evening telephone numbers, and must contain the following language:

I am a Settlement Class Member in the lawsuit Janet Makin, et al. v. State of Hawaii, et al., Civil No. 98-00997 DAE. I wish to opt out of the settlement of this case. I understand that by requesting to be excluded from the Class Settlement, I will not be bound by and receive no benefits from the

Proposed Settlement and that I may be able to bring my own lawsuit against the Defendants in which case I will not be represented by the attorneys for the Class. I also understand, however, that in my separate lawsuit, I may receive less than I would if I had opted to remain as a Class Plaintiff.

C. You May Do Nothing

If you do nothing, you will remain a Settlement Class Member and you will be bound by and receive all the benefits of the Proposed Settlement.

4. BINDING EFFECT OF THE PROPOSED SETTLEMENT

If finally approved by the Court, the Proposed Settlement will be binding on all members of the Settlement Class and will bar all Settlement Class Members who do not opt out of the Proposed Settlement under the procedure described in paragraph 3(b) above, and their assigns, heirs, trustees, administrators, legal representatives or guardians, from seeking any relief from the Defendants for claims arising under or related to the allegation that Hawaii's administration of its Home and Community-Based Waiver Services program and waitlist policies violated the Americans with Disabilities Act, the Rehabilitation Act of 1973; the Federal Medicaid Act; and their Constitutional rights to equal protection and substantive due process.

The Proposed Settlement, if approved by the Court, will be entered as a Judgment that will release Defendants from all claims that were or could have been alleged in the Lawsuit, including claims arising out of, related to, or based in whole or in part on any of the facts, incidents, complaints, conduct, omissions, transactions, occurrences, matters, rights or causes of action alleged or asserted or which were otherwise at issue in the Lawsuit.

5. CLASS COUNSEL

SHAWN A. LUIZ, ESQ. or MATTHEW C. BASSETT, ESQ., of the Hawaii Disability Rights Center, 1580 Makaloa Street, Suite 1060, Honolulu, Hawaii 96814, telephone (808) 949-2922, ext. 207; fax (808) 949-2928, are co-counsel for the Class Plaintiffs.

6. HEARING ON PROPOSED SETTLEMENT

A hearing to determine whether the Proposed Settlement is fair and reasonable and should be approved will be held on **August 14, 2000, at 9:00 a.m.**, in the Courtroom of the Honorable David A. Ezra, Chief Judge of the United States District Court for the District of Hawaii, 300 Ala Moana Boulevard, Honolulu, Hawaii 96850.

It is not necessary for you to appear at the hearing. If you wish to be represented at the hearing by your own attorney at your expense, your attorney must so notify the Clerk of the Court in writing by **July 3, 2000**.

7. ADDITIONAL INFORMATION

A. Inspection of Pleadings and Other Records

The pleadings and other records in the Lawsuit, including complete copies of the Proposed Settlement, may be examined during regular office hours at the office of the Clerk of the United States District Court for the District of Hawaii, 300 Ala Moana Boulevard, Honolulu, Hawaii 96850; or, you may obtain copies of any of these documents at your own expense by contacting the attorneys for the Class Plaintiffs, SHAWN A. LUIZ, ESQ. or MATTHEW C. BASSETT, ESQ., of the Hawaii Disability Rights Center, 1580 Makaloa Street, Suite 1060, Honolulu, Hawaii 96814, telephone (808) 949-2922, ext. 207; fax (808) 949-2928.

B. Review of the Settlement Agreement

Copies of the signed Settlement Agreement are available for inspection, and copying at the requestor's expense, at the Hawaii Disability Rights Center and at these offices of the Developmental Disabilities Division of the Department of Health, State of Hawaii:

Kinau Hale, 1250 Punchbowl Street, Room 258, Honolulu, HI 96813;
Diamond Head Health Center, 3627 Kilauea Ave., Room 109, Honolulu, HI 96816;
Administration Building, 2201 Waimano Home Road, Pearl City, HI 96782;
Keawe Health Center-CSDD, 48 Keawe Street, Hilo, HI 96720;
State Building, 54 High Street, Room 415, Wailuku, HI 96793; and
Department of Health Building, 3040 Umi Street, Lihue, HI 96766

Internet Access. The Proposed Settlement Agreement and Notice of Proposed Class Action Settlement can be found at the following web addresses:
www.pixi.com/~pahi and www.hi.gov/health

C. Questions Regarding the Proposed Settlement

If you have any questions about the Proposed Settlement, you may call or write the attorneys for the Class Plaintiffs, SHAWN A. LUIZ, ESQ. or MATTHEW C. BASSETT, ESQ., of the Hawaii Disability Rights Center, 1580 Makaloa Street, Suite 1060, Honolulu, Hawaii 96814; telephone (808) 949-2922, ext. 207; fax (808) 949-2928.

**PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE WITH
QUESTIONS REGARDING THE PROPOSED SETTLEMENT**

IMPORTANT DEADLINES:

July 3, 2000	Deadline to Comment on the Proposed Settlement.
July 3, 2000	Deadline to "Opt-Out" of the Proposed Settlement.
August 14, 2000	U.S. District Court hearing on the Proposed Settlement.